LIBRARY
SUPREME COURT, U
EP 20

No. 73-226

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM P. STARK AND LERA H. STARK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-226

WILLIAM P. STARK AND LERA H. STARK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this gift tax case, petitioners made gifts of stock of their closely held corporation to three trusts, one for the benefit of each of their three minor grandchildren. Each trust instrument provided that the beneficiary was to receive the net income from the trust until he reached the age of 30, at which time he could receive the corpus. Under Section 2503(b) of the Internal Revenue Code of 1954, a donor can exclude $3,000 from each gift to any person from the total taxable gifts made during the year. There are two requirements for application of the exclusion. First, under the terms of the statute such gifts must be "other than gifts of future interests in property." Second, since the statutory exclusion is for the first $3,000 of each gift, the ex-

clusion is applicable only to gifts having an ascertainable value.[1]

Petitioners acknowledged in the courts below (Pet. A2) that the gifts of corpus to each trust were future interests and ineligible for the $3,000 exclusion. However, they contend that they are entitled to the exclusion for the gift of income to each beneficiary. Without reaching the question whether the gifts of income were present or future interests, both courts below denied the exclusion on the ground that the income interests had no ascertainable value.

1. Based on the evidence, which demonstrated that it was improbable that the corporation would pay any dividends, the courts below held that the income interests had no ascertainable value. No dividends had been declared during the prior thirteen years (Pet. A7). According to the testimony of petitioner's son, who was president of the corporation and trustee of the trusts, the corporation was so "strapped for working capital" that it would be a hardship for it to pay dividends in the foreseeable future (R. 32, 36).[2] Although the trustee had the power to sell the stock and reinvest the proceeds (R. 14-15), the stock was not publicly traded nor had it ever been offered for sale to the public (Pet. A7). It was therefore improbable that it could be sold by the trustee and the proceeds reinvested in income producing assets.

---

[1] *Van Den Wymelenberg* v. *United States*, 397 F. 2d 443 (C.A. 7), certiorari denied, 393 U.S. 953; *Fischer* v. *Commissioner*, 288 F. 2d 574 (C.A. 3); *Funkhouser's Trusts* v. *Commissioner*, 275 F. 2d 245 (C.A. 4), certiorari denied, 363 U.S. 804; *LaFortune* v. *Commissioner*, 263 F. 2d 186 (C.A. 10); *Herrmann's Estate* v. *Commissioner*, 235 F. 2d 440 (C.A. 5); *Commissioner* v. *Brandegee*, 123 F. 2d 58 (C.A. 1).

[2] "R." references are to the record appendix in the court of appeals.

Under these circumstances, the courts below properly rejected petitioner's contention, renewed here (Pet. 9-12), that notwithstanding the absence of any evidence of an ascertainable value, the value of the income interest should be computed in accordance with the valuation tables for life interests provided by Section 25.2512-5(c) of the Treasury Regulations on Gift Tax (1954 Code). These tables assume an annual income yield of 3½ percent on the value of the donated property at the time of the gift. However, in order to insure that the use of the tables will not result in an unrealistic or unreasonable valuation, the rule is that the tables be used only where the property interest is likely to yield income. *Morgan* v. *Commissioner,* 42 T.C. 1080, 1088, affirmed *per curiam,* 353 F. 2d 209 (C.A. 4); *Commissioner* v. *Maresi,* 156 F. 2d 929 (C.A. 2); *Hanley* v. *United States,* 63 F. Supp. 73 (Ct. Cl.); *Carl E. Weller* v. *Commissioner,* 38 T.C. 790, 803. In view of the exceedingly small likelihood that any income would be payable to the trust beneficiaries in the foreseeable future, it would have been unrealistic to assume the annual income rate of 3 1/2 percent upon which the tables are based.

2. Petitioners' assertions (Pet. 9-10, 12-13) of a conflict of decisions are without merit. Both *Simpson* v. *United States,* 252 U.S. 547 and *Ithaca Trust Co.* v. *United States,* 279 U.S. 151 involved the use of the valuation tables to value life estates where the continued production of income could be safely assumed. Moreover, while the Fourth Circuit in *Rosen* v. *Commissioner,* 397 F. 2d 245, justified the taxpayer's use of the tables in valuing the gift of the income interest of non-income producing stock, the critical ground of the decision was that the "shares appear[ed] to be freely marketable" because "the stock [was] held publicly and * * * listed on the American Stock Exchange." (397 F. 2d at 248).

On these facts, the court in *Rosen* held the trustees' power to sell the stock and reinvest the proceeds in income producing property not to be "truly illusory." Cf. *Morgan* v. *Commissioner, supra.* Given the lack of free marketability of the stock in this case, there was no basis for a similar assumption of conversion by the trustee to income producing property which might justify the use of the valuation tables.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.